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THE RIGHT OF A MEMBER OF A FAMILY TO COMPENSATION FOR SERVICES.

It is an elementary doctrine of the law of contracts that, where service is rendered and received, a contract of hiring, or an obilgation to pay compensation, will generally be presumed; 2 *Parson's Contr.*, p. 48, §46.

Where near relatives either by blood or marriage reside together as one common family, the one furnishing board and lodging, clothing or other necessaries or comforts of life, and the other in return rendering services, a presumption arises that neither party intended to receive or to pay compensation for the board or other necessaries or comforts furnished on the one hand or services rendered on the other; *Hill v. Hill*, 121 Ind., 255.

A recent California decision, *In re Rorher's Estate*, 117 Pac. Rpt. 672, in which the claimant stood in the relation of nephew's wife and lived with her husband in the testator's home without cost to her or her husband, allowed the claimant a *quantum meruit* on an implied contract. But the Court went further and stated

that "The relationship between a testator and his nephew's wife who cared for him during his last illness, and the fact that she and her husband resided in the testator's home, raise no presumption that she took care of him gratuitously." The testimony showed that for some nineteen months prior to his death the testator required almost constant care; that the claimant was prompted to perform the services out of kindness and had no intention of charging; that the testator had remarked "she would be well paid," tho' no compensation was ever fixed, nor the manner of payment mentioned; that a legacy had been made leaving claimant $1,000, which legacy had failed; that the one drafting the will testified that the testator said he wished to leave claimant a legacy in reward for her services.

The courts in dealing with the subject have followed one of two theories: either that the relationship has the effect of abstracting from the case the element of the presumption which is entertained when strangers are concerned—leaving it a mere question of fact, *Saunders v. Saunders,* 90 Me. 284; or that the relationship by blood or marriage, either alone or in combination with membership of the same household, raises an affirmative, independent presumption that the services were gratuitous, *Hall v. Finch,* 29 Wis. 278. A review of the cases will indicate a predominance in the favor of the latter as a basis.

The reason for such a presumption lies in the fact that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family and are gratuitously performed.

What emphasis is laid upon the various degrees of relationship in connection with this presumption may be seen in such undisputed statements as, "While the rule is that where one lives with and performs services for a near relative the presumption arises such services were intended to be gratuitous, yet, in such cases the more distant the relationship the weaker the presumption and it would not have the force and controlling effect where the parties are uncle and niece, that it would have where they are parent and child"; *Quigly v. Harold,* 22 Ill., App. 269. The presumption, it will be observed, remains tho' with lessened force.

The cases indicate that membership in the same household, when the relation becomes more remote than that of parent and child, is the ultimate determining element. In *Moore v. Renick,* 95 Mo. App. 202, "The relation of brother and sister was not *per se* sufficient to authorize the presumption that the services performed were gratuitous, unless they lived together in the family relation." The family has been defined to be a collection or collective body of persons (not necessarily related) who live under one roof and under one head or management; *In re Estate of Bishop,* 130 Iowa, 253.

Where no blood nor marital relation exists, merely living as members of the same household gives rise to the implication that no compensation was intended; *Deppen v. Personette,* 93 Ill. App. 513.

Because cases of this character are among the most odious that the courts have to deal with, a higher degree of certainty and definiteness in the evidence relied upon to establish an agreement is demanded; *Hinkle v. Sage,* 67 Ohio St., 256. The encouragement of claims for such services is to destroy the peace and harmony of the family through the strife and controversy resulting. Some courts require the proof of an express contract; *Wall's Appeal,* 111 Pa., 460. This has its basis in the danger of fraud and perjury by permitting any member of a family to insist upon a greater share of property in an estate than is given by law or by will on the ground that it is due for services. Other courts allow either an express or implied contract to be proven; *Heffron v. Brown,* 155 Ill. 322.

"The terms 'express contracts' and 'contracts implied in fact' are used to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties"; *Keener, Quasi Contr.* 5. Much diversity of expression seems to exist. The result, however, is that a circumstantial proof of an express contract seems allowable in the most strict states, as Pennsylvania; *Heffron v. Brown,* supra. The difference between the views becomes one of exceeding minuteness—sifting itself into a divergence as to the certainty which the evidence must satisfy.

To establish a contract there must appear to have been a manifest intention at the time claimant undertook services to charge for them and that the recipient of the services accepted them with a knowledge of the intention; *In re Schmidt's Est.,* 93 Wis., 120.

The case, *Porter v Dunn,* 131 N. Y., 314, cited in the second part of the decision of the case in question does not apply at all to the presumption therein considered, for the facts do not involve any relationship, blood, marital, or family—the testator, who had been nursed by the claimant, being a boarder. The family relation was not claimed. The case, rather, refers to the allowance of a *quantum meruit.*

A review of the cases shows that in most of the states the presumption arises in all cases where the parties occupy the position of members of a family; *Clarke on Contracts,* (2 ed.) p. 17.

It is submitted that the apparent overthrowing of the relationship and ignoring of a presumption places this decision in opposition to the weight of authority.

RIGHT OF A CARRIER TO STIPULATE IN GRATUITOUS PASSES AGAINST ITS OWN NEGLIGENCE.

That a carrier may not lawfully contract against liability for injuries to passengers *for hire* resulting from its own negligence, is a rule of almost universal application. The courts give two reasons why public policy requires such a rule: First, it frequently happens that business demands immediate transportation, although it may be at the sacrifice of legal rights, and common carriers have their patrons at such a great disadvantage that they can readily exact from them a stipulation to the effect that the carrier will not be liable for injuries resulting from the negligence of its servants. The contract is one-sided. The patrons have no alternative offer. Second, the state or government has such an interest in protecting the lives and limbs of its citizens that it cannot permit the carrier to make any contract tending to diminish the care taken to protect passengers from injury.

An examination of the decisions on this point shows that some courts base the rule on the first of these reasons, and others on

the second. Regardless of the basis for the rule, the conclusion is the same, so long as we are concerned only with passengers for hire. But whether the same rule will be applied to passengers riding on gratuitous passes will depend upon which of the above given reasons is accepted as the foundation of the rule. The following cases will show that the courts have differed as to which is the true basis of the general rule, and in so doing they have necessarily differed in their answer to this question.

It was recently decided in *Shelton v. Railway Co.,* 189 Fed. 1, that where a man had accepted a pass for which he had given no consideration, and there was printed on the pass a stipulation that the carrier would not be liable for any injury to his person, even by the negligence of its servants, the stipulation was valid, and the holder of the pass, having been injured by the negligence of the carrier, was not allowed to recover.

The court disposed of the question by saying that the holding in *Railway Co. v. Adams,* 192 U. S., 440, governed the case. In the case last cited, Justice Brewer, speaking for the court, said that the carrier may contract against its negligence in cases of persons riding on free passes. On this point the court said, "It (the railway company) offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They were on equal footing. If he had desired to hold it to its common law obligation to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions." In *Boering v. Railway Co.,* 193 U. S., 442, the court, through the same eminent Justice, reaffirmed its former holding in these words: "A person who is injured while a passenger of a railroad company by reason of the negligence of the company's agents cannot recover damages from the company if injured while riding on a free pass, issued by the company as a mere gratuity and containing a printed condition that the party accepting and using it assumes all risk of accident to person or property, whether caused by the negligence of the company's agents or otherwise: such condition being valid and binding." The same conclusion was reached in the following cases: *Rogers v. Steamboat*

Co., 86 Me., 261; *Quimby v. Railway Co.*, 150 Mass., 365; *Kinney v. Railway Co.*, 32 N. J. L., 407; *Muldon v. Railway Co.*, 10 Wash., 311; *Wells v. Railway Co.*, 24 N. Y., 181; *Payne v. Railway Co.*, 157 Ind., 616.

In the last case cited, the court held that not only was no principle of public policy subverted by denying the holder of a free pass the right to repudiate his contract, but that there was sound public policy in holding him to it. The argument of the court was that persons who accept free passes voluntarily separate themselves from the general public, and in so doing they increase the burden of the expense of operating the railroads on the patrons who pay.

A survey of the cases cited above discloses the fact that the decisions go on the theory that the general rule prohibiting the limitation of the carrier's liability does not apply to holders of free passes because such persons are free to accept the terms offered to reject them, pay the fare and hold the company to its common law liability. They rest entirely on the first of the two reasons previously mentioned.

But some jurisdictions hold that the general rule rests not so much on the inability of the patron to contract on equal footing with the carrier, but on the theory that "the law raises the duty out of regard for human life and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands." *McNeil v. Railroad,* 135 N. C., 682. That case held the stipulation void and permitted recovery. Likewise in *Jacobus v. Railway Co.*, 20 Minn., 130, the court held that so far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature, and that no stipulation of the parties in disregard of it or involving its sacrifice in any degree can be permitted to stand. Therefore, whether "the case be one of a passenger for hire, a merely gratuitous passenger, or a passenger upon a conditioned free pass, the interest of the state in the safety of the citizen is obviously the same." This view is supported by *Railway Co. v. Flood,* 35 Tex., Civ. App., 197; *Rose v. Railroad,* 39 Iowa, 246; *Railway Co. v. Butler,* 57 Penn. St., 337; *Burnett v. Railway Co.,*

176 Penn. St., 45; *Farmers Loan & Trust Co. v. Railway Co.*, 102 Fed., 17; *Railroad v. McGowan*, 65 Tex., 640.

Undoubtedly the weight of authority is with the principal case in holding that a stipulation in a gratuitous pass whereby the holder of the pass agrees to assume the risks of injury, even when caused by the carrier's negligence, is valid and binding. But it appears that there is much authority for holding such stipulation void.